BEFORE THE SURFACE TRANSPORTATION BOARD

GNP RLY INC. —ACQUISITION AND EXEMPTION REDMOND SPUR AND WOODINVILLE SUBDIVISION	)	FD # 35407 -228164
BNSF RAILWAY COMPANY—ABANDONMENT EXEMPTION— IN KING COUNTY, WA	)	AB-6 (SUB. NO. 463X) -228165
BNSF RAILWAY COMPANY—ABANDONMENT EXEMPTION— IN KING COUNTY, WA	)	AB-6 (SUB. NO. 465X) -228166

Comment of the Rails-to-Trails Conservancy

Rails to Trails Conservancy (RTC) hereby submits the following comment on the petition filed by GNP Rly, Inc. (GNP), a Class III rail carrier, which is seeking an exemption from the provisions of 49 U.S.C. § 10902 to acquire the residual common carrier rights and obligations including the right to reinstitute rail service on two railbanked corridors: the Redmond Spur and the Woodinville Subdivision, which are currently owned by the Port of Seattle in King County. GNP also seeks to vacate the Notices of Interim Trail Use (NITUs) issued to King County, WA, which entered into an interim trail/railbanking agreement with the Port of Seattle to operate an interim trail on these corridors.

Interest of RTC

Rails-to-Trails Conservancy (RTC) is a national nonprofit conservation organization founded in 1985. Headquartered in Washington, D.C., with four regional field offices located in California, Florida, Pennsylvania, and Ohio, RTC's mission is to

create a nationwide network of trails from former rail lines and connecting corridors to build healthier places for healthier people. RTC has more than 73,359 members nationally and 2,247 in the state of Washington.

Discussion

The transactions between King County, WA, GNP, and the Port of Seattle relating to the Redmond Spur and Woodinville Subdivision are complex, and the disposition of this request may well rest on the specific, and perhaps unique facts involved in these transactions. However, as GNP acknowledges, this petition seeks to establish a new precedent that would allow this Board to authorize rail operations over a railbanked corridor "where the petitioning carrier does not own the right-of-way or have the common carrier rights to reactivate the service." GNP Petition, at 6. As discussed herein, the precedent that GNP seeks to establish will interfere with existing contractual arrangements between railroads and interim trail managers executed pursuant to the Section 8(d) of the National Trails Systems Act, 16 U.S.C. § 1247(d), disrupt settled expectations of the parties to these arrangement in a potentially unconstitutional manner, encourage abusive filings, and undermine the effective implementation of the federal railbanking program. This Board should decline to adopt this precedent.

A. There Is No Precedent For this Board to Authorize the Acquisition of Rail Line or Operation of Rail Service Where the Requester Has No Legal or Contractual Right to Operate Rail Service on the Line.

The regulations governing exempt transactions under 49 U.S.C. § 10902 clearly provide that the applicant must provide "[a] statement that an agreement has been reached or details about when an agreement will be reached." 49 C.F.R. § 1150.43(c). As GNP concedes in its petition, "King County has not as yet agreed to GNP's restoration

of service." GNP Petition, at 10. As GNP therefore acknowledges in its petition, this Petition presents "an issue of first impression" before this Board of whether a petitioning carrier can receive STB permission to reactivate rail service on a right-of-way that it does not own and over which it has no common carrier rights to restart service. GNP Petition for Exemption, at 6.

GNP's suggestion that regulatory rights to reactivate rail service can be granted to an operator that has no legal right to acquire those rights is without support. To the contrary, in each of the cases in which an entity has received permission from this Board to acquire reactivation rights in order to provide rail service on a railbanked line, the entity had entered into a voluntary agreement to acquire the reactivation rights from the holder of those rights. *See, e.g.,* Browns, Grayville & Poseyville Railway Company–Acquisition and Operation Exemption–Owensville Terminal Company, Inc., STB Finance Docket No. 34750 (STB served Sept. 20, 2005) (noting that the petitioner had entered into an agreement with the abandoning railroad to acquire reactivation rights); RJ Corman Railroad Co./Pennsylvania Lines, Construction and Operation Exemption – Line of Norfolk Southern Railway, in Clearfield County, PA, FD No. 35143, STB served June 5, 2008) (R.J. Corman) (granting Class III carrier permission to acquire abandoning railroad's residual common carrier rights and obligations, including the right to reinstate rail service, on the former Snow Shoe Industrial Track, based on option agreement between the petition and the abandoning railroad, and the abandoning railroad's express consent to the petitioner's reactivation of rail service on the railbanked line); BG & CM Railroad, Inc. – Acquisition and Operation Exemption – Camas Prairie Railnet, Inc., STB

Finance Docket No. 34399, STB served Oct. 17, 2003) (BG & CM) (Abandoning railroad assigned reactivation rights to requester).

GNP cites no cases for the proposition that a regulatory right to operate rail service on a railbanked corridor can be conferred on an entity that has no legal right to acquire the rights necessary to operate rail service. Instead, GNP merely asserts that the STB does "not require a demonstrated ability to consummate a transaction before an exemption may be granted." GNP Petition, at 8. However, in each of the cases cited by GNP, the entities requesting the exemption already had equitable title or a legally enforceable right to purchase the rights necessary to operate rail service. *See* Standard Terminal Railroad of New Jersey, Inc.—Acquisition Exemption—Rail Line of Joseph C. Horner, STB Finance Docket No. 34551, STB served Oct. 8, 2004 ("STRR states that it has purchased the right to operate over this line of railroad, which is owned by Joseph C. Horner, pursuant to a perpetual, irrevocable, exclusive and assignable easement."); Prairie Central Rv. Co.—Acquisition & Operation, 367 I.C.C. 884 (1983) (railroad had been assigned trackage rights).

In short, these cases merely hold that this Board will not withhold acquisition approval simply because the agreements to acquire the property rights have not been consummated, and/or may be subject to divestment.[1] Here, of course, GNP is asserting the converse proposition: that the regulatory rights should be granted to an entity that has no demonstrated ability to enter into, much less consummate a transaction to acquire the

[1] If for some reason, the agreements were not consummated or the legal rights asserted by the petitioner were otherwise defeated, this Board would then revoke the acquisition authorization previously granted on the basis of these agreements. For example, in Black Hills Transportation, Inc., d/b/a Deadwood, Black Hills & Western Railroad – Modified Rail Certificate, STB Finance Docket No. 34924, STB served Jan. 27, 2010), this Board revoked a modified certificate acquired under 49 CFR 1150.21, based on its finding that "the Authority has no property rights to the ROW." *Id.* at 4.

rights necessary to operate rail service on a line. Accordingly, there is no precedent for the proposition that GNP seeks to establish: that a Class II or III carrier with no enforceable legal interest whatsoever in a railbanked corridor is entitled to permission from this Board to reactivate rail service the line.

Indeed, the precedent that GNP seeks to establish – to grant an entity the right to operate rail service on a corridor that it has no legal rights to acquire – is analogous to the provisions of the Interstate Commerce Commission Abandonment Act authorizing forced transfers under specified circumstances, such as Offers of Financial Assistance (OFAs) authorized by 49 U.S.C. § 10904, feeder railroad sales authorized by 49 U.S.C § 10907, mandatory crossings authorized under 49 U.S.C. § 10901(d)(1)(C) (mandatory crossing authority), or directed services under 49 U.S.C. § 11123. Significantly, in each of these instances where this Board has the authority to compel a forced sale of a rail line to an applicant that has no existing legal or contractual right to operate on the line, this Board is required to ensure that the present owner/operator is compensated for the forced sale.[2]

In effect, the authorizations sought by GNP would grant the equivalent of a right to seek a forced sale of the property, without establishing any remedy for implementing this right. Unlike the OFA or feeder rail forced sales, there is no mechanism in 49 U.S.C. § 10902 for protecting the legal rights and property interests that the requester seeks to

[2] In the case of an OFA, the Board is empowered to "determine the amount and terms of subsidy based on the avoidable cost of providing continued rail transportation, placing a reasonable return on the value of the line." 49 C.F.R. § 1152.27(h)(5). In the case of feeder railroad development, the Board must determine that "[t]he applicant is capable of paying the constitutional minimum value of the line" and then "shall set the acquisition cost of the line." *Id.* §§ 1151.4(a)(1), 1151.4(c). The statute grants railroads mandatory crossing rights only if "the owner of the line compensates the owner of the crossed line." 49 U.S.C. § 10901(d)(1)(C). In the case of emergency directed service, the statute provides that "When rail carriers do not agree on the terms of compensation under this section, the Board may establish the terms for them." *Id.* § 11123(b)(2).

displace. Under these circumstances, granting a requester a regulatory right to operate rail service that it has no demonstrated ability to consummate is a recipe for legal chaos.

B. This Board Should Not Vacate A NITU Where the Requester Is Not In Privity With the Parties to the Interim Trail User/Railbanking Agreement.

While any service provider may seek Board authorization to restore active rail service on all or parts of a railbanked corridor, only a "*bona fide* petitioner, *under appropriate circumstances*, may request the NITU to be vacated to permit reactivation of the line for continued rail service." King County, Wash.–Acquisition Exemption–BNSF Railway Company, FD 35148, at 4 (STB served Sept. 18, 2009) (emphasis added). In RTC's view, a petitioner is not *bona fide*, and the circumstances are not appropriate, where the petitioner has entered into a voluntary transaction to acquire reactivation rights, and does not possess a legal right to consummate any authority granted by the STB to operate rail service on the line. Such a precedent would wreak havoc on the preexisting legal and property rights of interim trail managers under existing railbanking/interim trail use agreements, would open the door to abusive petitions, such as requests to vacate NITUs filed by adjoining landowners, and will undermine the implementation and effectiveness of the federal railbanking program.

1. Vacating a NITU In Response to A Request by An Entity That Is Not In Privity with the Parties to the Interim Trail Use/Railbanking Agreement Would Interfere with the Property Rights of those Parties.

There is no precedent for the STB to vacate a NITU or Certificate of Interim Trail Use (CITU) in response to a request from an entity that is not in privity of contract with either the interim trail manager or the abandoning railroad that would permit it to exercise rights under the interim trail use/railbanking agreement. GNP's reliance on Georgia Great Southern-Abandon. & Discon. Of Service- GA, 6 S.T.B. 902 (2003) (Georgia

Great Southern) as the principal authority for its request to vacate the NITU is misplaced. In Georgia Great Southern, this Board relied on the interim trail use/railbanking agreement between the parties in finding that "Congress intended to leave compensation matters to the parties *in the trail use agreements*." Georgia Great Southern, 6 S.T.B. at 908 (emphasis added). In doing so, this Board recognized that the interim trail use/railbanking agreement governed the rights and responsibilities of interim trail manager in the context of rail service reactivation requests, and these rights and responsibilities were fully enforceable by the parties thereto.

Consistent with this ruling, this Board has vacated NITUs only upon request by the abandoning railroad, its successor in interest, or an entity that has been assigned reactivation rights.[3] Thus, in each of the cases involving reactivation of rail service, the entity requesting that the NITU or CITU be vacated would have stood in the shoes of the abandoning carrier, and therefore had both the legal right to reactivate under the agreement, and was also bound by the obligations established by the interim trail use/railbanking agreement in exercising those rights.

Vacating the NITU in response to a reactivation request by an entity with no legal rights or obligations under the interim trail use/railbanking agreement would place the corridor and the parties in legal limbo: the requester would hold a regulatory right to operate rail service on the corridor with no meaningful ability to exercise that right, while

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[3] *See* Iowa Power-Const. Exempt-Council Bluffs, IA, 8 I.C.C.2d 858, 866-67 (1990) (acknowledging rights of abandoning railroad to reactivate rail service on railbanked line); Georgia Great Southern, 6 STB at 906 (granting request by successor-in-interest to abandoning carrier to reactivate rail service on a railbanked line); Owensville Terminal Company, Inc. -- Abandonment Exemption — In Edwards and White Counties, IL and Gibson and Posey Counties, IN, Docket No. AB-477 (Sub-No. 3X) (STB served September 20, 2005) (NITU vacated based on representation that abandoning railroad conveyed its right to reinstitute rail service on the line to requester); BG & CM Railroad, Inc. – Acquisition and Operation Exemption – Camas Prairie Railnet, Inc., STB Finance Docket No. 34399, STB served Oct. 17, 2003) (BG & CM) (trail

the trail manager would retain the legal responsibility and full liability for holding and managing the property, with no regulatory right to operate a trail. While in this legal limbo, the corridor would be not be used or developed for trail or rail service, and could easily become vulnerable to adverse abandonment actions.

Given this Board's disavowal of any authority to adjudicate these rights, the courts would be left to untangle the web of conflicting rights and responsibilities resulting from such a ruling, with little guidance or standards for ensuring a fair and equitable resolution. Moreover, the courts may rule that the legal rights and responsibilities under the interim/trail use agreement were somehow voided by the authorizations granted by this Board. If the corridor was then declared to be abandoned, this Board's action in summarily vacating the NITU in this context could result in a "taking" without Due Process of law of the property interests held by the parties to the interim trail use/railbanking agreement. *See* Penn Central Railroad Corp. v. U.S. Railroad Vest Corp. 955 F.2d 1158 (7th Cir. 1992). In short, the precedent sought by GNP is a recipe for legal chaos.

2. The Precedent Sought by GNP Would Undermine the Effective Implementation of the Federal Railbanking Program.

The protections afforded by the interim trail use/railbanking agreement are essential in allowing the railbanking program to be implemented. These agreements protect the substantial investment that an interim trail manager makes in acquiring, developing and making improvements to a rail-trail on a railbanked corridor. They also protect the continuing and often complex interests in a railbanked corridor retained by the abandoning railroad or the entity to which the railroad has transferred reactivation rights.

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manager granted permission to reactive rail service over corridor to which it had previously acquired

For this reason, the federal railbanking statute specifies "interim use of any established railroad rights-of-way *pursuant to donation, transfer, lease, sale, . . .*" 16 U.S.C. § 1247(d) (emphasis added).

Increasingly, these interim trail use/railbanking agreements anticipate the possibility of rail service reactivation by the railroad or its assignee, and define the terms and conditions governing rail service reactivation in order to protect the trail managers legitimate property rights and interests. Even where the interim trail use/railbanking agreement is silent on the terms and conditions of rail service reactivation, railroads have taken the position to the Internal Revenue Service, that such "compensation would be imputed" and the railroad "has to repurchase what it conveyed to the trail provider." IRS Technical Advice Memorandum 200610017, at 6 (Nov. 25, 2005).

Further, many trails are developed with public funds, granted on condition that the trail manager reimburse the government if trail improvements are removed prior to the expiration of their useful life. Therefore, the interim trail use/railbanking agreement may require the reactivating railroad to pay for any liability that the trail manager may owe to public agencies for the amortized value of government-funded trail improvements. In cases where the right of way has excess width, the interim trail manager might successfully negotiate for trail use to continue upon rail service reactivation as a rails-with-trails arrangement, thereby fully protecting its investment through the interim trail use/railbanking agreement.

Interim trail use/railbanking agreements may also require the reactivating railroad to commit to future railbanking in the event the reactivating railroad subsequently decides to abandon rail service. For example, in BG & CM, the entity seeking to reactivate rail

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reactivation rights).

"specifically requested that the Board reserve jurisdiction to re-impose an interim trail use/rail banking condition . . . should BG & CM cease service on the line the terms of reactivation of rail service." BG & CM, at 3. In this manner, these interim trail use/railbanking agreements continue to carry out the objectives of the federal railbanking program by ensuring that the preservation of re-activated rail corridors.

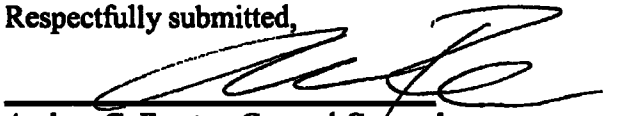
If these carefully-negotiated railbanking/trail use arrangements could be upended by an entity that has no legal rights or obligations under the agreement, trail managers will be reluctant to make an investment in acquiring and developing railbanked trails. Likewise, government agencies will be reluctant to fund the acquisition or development of rail corridors, further reducing the ability of trail managers to accept the significant financial and legal responsibilities of managing a railbanked trail. Trail opponents will certainly start petitioning for operating authority on railbanked corridors as a pretext for vacating NITU's and then fully abandoning the corridors.

Under such circumstances, few if any trail managers and perhaps few railroads would be willing to participate in the railbanking program administered by this Board. The end result would be that more railroad corridors would be removed from the national rail network –a result that is directly contrary to the statutory commend that this Board "*shall* encourage State and local agencies and private interests to establish appropriate trails using the provisions of" the federal railbanking law. 16 U.S.C. § 1247(d) (emphasis added).

Conclusion

For the foregoing reason, GNP's petition should be denied.

Respectfully submitted,



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CERTIFICATE OF SERVICE

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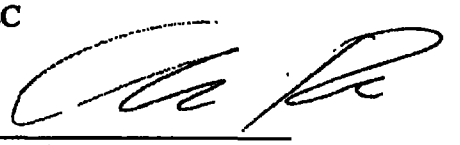

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